Supreme Court, U.S.
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No. 93-93

IN THE

Supreme Court of the United States

October Term, 1993

ROANOKE RIVER BASIN ASSOCIATION,

Petitioner,

V.

COLONEL RONALD E. HUDSON, in his official capacity as Norfolk District Engineer, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated: July 19, 1993

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QUESTION PRESENTED FOR REVIEW

Where the petitioner prevailed on some but not all issues below, did the court of appeals err when it focused on the Government's overall position in the entire case -- instead of only on the issues on which the Government lost -- in determining that the Government's "position" was substantially justified and that the petitioner was therefore not entitled to an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1988)?

PARTIES

The parties to the proceeding in the court below were: Roanoke River Basin Association; State of North Carolina; Brunswick County, Virginia, Board of Supervisors; Charlotte County, Virginia, Board of Supervisors; Granville, County, North Carolina; Halifax County, Virginia, Board of Supervisors; Halifax County, North Carolina; Martin County, North Carolina; Mecklenburg County, Virginia, Board of Supervisors; Northampton County, North Carolina; Vance County, North Carolina; Warren County, North Carolina; Washington County, North Carolina; Ronald E. Hudson, Colonel, in his official capacity as Norfolk District Engineer; Wayne A. Hanson, in his official capacity as Wilmington District Engineer; and Joseph K. Bratton, Lt. General, in his official capacity as the Chief of Engineers of the U.S. Army Corps of Engineers.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROANOKE RIVER BASIN ASSOCIATION,

Petitioner,

v.

COLONEL RONALD E. HUDSON, in his official capacity as Norfolk District Engineer, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Roanoke River Basin Association ("RRBA"), prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the panel of the court below (App. A, *infra*, pp. 1a-29a) is reported at 991 F.2d 132. The district court's order denying attorneys' fees to petitioner (App. B, *infra*, pp. 30a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1988).

STATUTE INVOLVED

28 U.S.C. § 2412 provides, in pertinent part:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1988).

STATEMENT OF THE CASE

This litigation concerns a dispute over a petition by the Roanoke River Basin Association ("RRBA") for fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1988). The adverse parties are officers of the U.S. Army Corps of Engineers (collectively "the Corps"). The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 (federal question).

The instant controversy over RRBA's fee request is an outgrowth of extensive litigation, beginning in 1984, over the plan of the City of Virginia Beach, Virginia ("Virginia Beach") to construct a water supply pipeline to withdraw water from Lake Gaston, which straddles the Virginia-North Carolina border, for transport to southeastern Virginia. The facts of the underlying controversy are described in *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991),

cert. denied, 112 S. Ct. 1164 (1992), and will be summarized here.

Before the Corps issued its permit to Virginia Beach and executed an agreement with Virginia Beach to reallocate storage in a federally-owned reservoir from hydropower to water supply, RRBA and other opponents of the project contended, among other things, that the Corps had arbitrarily concluded that Virginia Beach needed an additional 60 million gallons of water a day, that the withdrawal of that amount from the Roanoke River system would have a significant effect on striped bass in that system, and that the Corps had an obligation to conduct an independent investigation of those issues rather than accept the analysis of Virginia Beach uncritically.

The Corps refused to undertake an independent review of these issues. In addition, it summarily rejected the request of the project opponents that it consider the past failure of Virginia Electric and Power Company, which

operates the last two downstream dams on the Roanoke River, to make prescribed releases from its impoundments during striped bass spawning season in determining whether an additional loss of 60 mgd from those impoundments would have a significant effect on striped bass. The Corps' response was: "This is a matter which the State should refer to VEPCO and FERC, for it has nothing to do with the Corps or this proposed project." *North Carolina v. Hudson*, 665 F. Supp. 428, 443 (E.D.N.C. 1987) (quoting from the Corps' administrative record).

On January 12, 1984, the State of North Carolina filed an action against Corps officials, challenging the issuance of a permit to Virginia Beach for its project principally on grounds that NEPA was violated. RRBA was permitted to intervene in that action, and added a challenge to the execution of the water supply allocation agreement, again primarily on NEPA grounds.

RRBA's nine-count Complaint alleged, among other

things, that the Corps failed to verify information on striped bass impacts and project need provided to the Corps by Virginia Beach, and that the Corps failed to give adequate consideration to each of the probable environmental effects of the project, particularly the project's effect on striped bass.

After more than two years of skirmishing over jurisdictional, procedural and discovery issues, the parties filed motions for summary judgment on the administrative record. Much of that skirmishing was over the nature and content of the administrative record.

The district court ruled on July 7, 1987, that the Corps' finding of no significant impact ("FONSI") and its public interest review were arbitrary and capricious. 665 F. Supp. at 443-44. The FONSI was set aside because

> [t]he court cannot accept as reasoned a decision that was based on incorrect or misleading information, especially when it implicates

> impacts on a declining species such as the striped bass. This is particularly true when it is derived from the applicants unverified analysis in the face of specific objections regarding the facts upon which the analysis was derived.

Id. at 443. The public interest review was deficient because the Corps accepted uncritically that Virginia Beach's "'need' was . . . all the water it would use in the next fifty years and not merely the additional water it will need beyond supplies which are currently available." *Id.* at 445.

The matter was remanded to the Corps for (1) an independent assessment of the effects of the proposed project on striped bass to determine whether an EIS is required or whether any mitigative measures are necessary; and (2) a determination of the extent of Virginia Beach's water needs. The district court retained jurisdiction of the matter for further review, and directed the Corps to file with the district

court the results of its reconsideration and the supporting record. *Id.* at 450.

On remand, the Corps considered these two matters for approximately 17 months before submitting its new findings and conclusions to the district court. Although the Corps adopted a revised FONSI, it imposed on Virginia Beach a mitigation condition to compensate for the effects of Virginia Beach's water withdrawals on striped bass.

Based on the favorable rulings it obtained in 1987 on the striped bass and need issues, RRBA subsequently requested an award of attorneys' fees and costs from the Corps pursuant to EAJA. The request was limited to the fees and expenses related to the issues upon which RRBA prevailed and eliminated any time that was arguably non-productive or duplicative. The Corps nevertheless opposed RRBA's petition, arguing that RRBA was not a prevailing party for the purposes of EAJA, and that in any event, the position of the Corps was substantially justified because the

Corps' decision to issue the permit was ultimately upheld on appeal.

On March 6, 1992, the district court denied RRBA's petition. It held that RRBA was a prevailing party because the initial analysis of the issue by the Corps was arbitrary and capricious, and because the Corps implemented a mitigation condition on remand that was designed to protect striped bass. The district court nevertheless looked to the *overall* position of the Corps in the litigation, rather than to the position of the Corps on each of the specific issues upon which RRBA prevailed, and determined that this *overall* position was not unreasonable and therefore was "substantially justified."

On appeal, the Government conceded that RRBA was a prevailing party for purposes of EAJA, and acknowledged that the Government had not contended that any special circumstances existed that would make an award to RRBA unjust. The only issue before the court of appeals was

whether the Government's position was substantially justified. The court of appeals affirmed the district court, concluding that the district court "did not err in considering the Corps' position *in the entire case* and the court's finding that that position was not rendered unreasonable by the two deficiencies found is not clearly erroneous." (*See* App. A, *infra*, p. 27a-28a).

REASONS FOR GRANTING THE WRIT

Congress enacted the Equal Access to Justice Act "to eliminate for the average person the financial disincentive to challenge unreasonable governmental action," and to "assure that administrative decisions reflect informed deliberation." *Commissioner of INS v. Jean*, 496 U.S. 154, 163, 165 n.14 (1990). The decision of the court below resurrects the financial barrier that the statute was designed to remove, encourages arbitrary and uninformed agency decisionmaking,

conflicts with the decisions of the United States Courts of Appeals for the Third and Eleventh Circuits on the same issue,[1] and is contrary to the teachings of this Court's

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[1] Although no other court has articulated the issue presented here precisely as did the court below, numerous other federal courts have essentially followed the analysis set forth in *Goldhaber v. Foley*, 698 F.2d 193 (3d Cir. 1983), and expressly adopted in *Matthews v. United States*, 713 F.2d 677, 683 (11th Cir. 1983). *See, e.g., McDonald v. Secretary of Health and Human Serv.*, 884 F.2d 1468, 1475-76 (1st Cir. 1989) (court awards fees and rejects substantial justification defense even though plaintiff did not prevail on two important claims); *Naekel v. Department of Transp., FAA*, 884 F.2d 1378, 1379 (Fed. Cir. 1989) (court awards fees and rejects substantial justification defense where plaintiff prevailed on four of six issues); *Animal Lovers Volunteer Ass'n v. Carlucci*, 867 F.2d 1224, 1225 (9th Cir. 1989) (court awards fees and rejects substantial justification defense even though one of two claims had been remanded and not yet finally resolved); *Jean v. Nelson*, 863 F.2d 759, 766-72 (11th Cir. 1988), *aff'd sub nom. Commissioner of INS v. Jean*, 496 U.S. 154 (1990) (court rejects substantial justification defense and awards fees that are reduced due to unsuccessful claims); *Sierra Club v. Secretary of the Army*, 820 F.2d 813 (1st Cir. 1987) (Government not substantially justified if its resistance to *any one* of several NEPA contentions is not substantially justified); *Granville House, Inc. v. HEW*, 813 F. 2d 881, 882-84 (8th Cir. 1987) (court awards fees and rejects substantial justification defense where plaintiff prevailed on roughly half of the issues raised); *Van Sant v. U.S. Postal Serv.*, 805 F.2d 141, 142-43 (4th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987) (despite plaintiff's limited success, dilatory tactics and frivolous arguments, court rejects substantial justification defense and awards reduced fees); *Kopunec v. Nelson*, 801 F.2d 1226, 1228-29 (10th Cir. 1986) (court awards fees and rejects substantial justification defense even though plaintiff only obtained preliminary relief); *Wyoming Wildlife Fed. v. United States*, 792 F.2d 981, 983-86 (10th Cir. 1986) (court awards fees even though plaintiff did not obtain full relief on each claim, rejecting substantial justification defense based on the government's position on each separate issue); *Washington Urban League v. FERC*, 743 F.2d 166, 167-69 (3rd Cir.

decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Accordingly, review -- perhaps even summary reversal -- by this Court is warranted to resolve a conflict in the circuits on this important question of statutory interpretation.

An award of fees and expenses under the EAJA is mandatory if three threshold conditions are met: (1) the claimant is a "prevailing party"; (2) the Government's position is not "substantially justified"; and (3) no special circumstances exist that make the award unjust. *Jean*, 496 U.S. at 158. The district court ruled that the petitioner was a "prevailing party" with respect to at least one significant issue -- the failure of the Corps to conduct its own independent analysis of the impact of the pipeline project on

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1984) (court awards reduced fees and rejects substantial justification defense even though plaintiff only prevailed on one of three claims); *Citizens Council v. Brinegar*, 741 F.2d 584, 592-96 (3rd Cir. 1984) (court awards full fees and rejects substantial justification defense even though plaintiffs did not prevail on all claims); *Johnson v. Secretary of/and HUD*, 594 F. Supp. 265, 267-68 (E.D. La. 1984) (court awards fees and rejects substantial justification defense even though plaintiff prevailed on one of four claims and recovered only a fraction of damages sought).

the striped bass population. It also set aside and remanded a second issue -- the failure of the Corps to justify the 60 million-gallon-per-day amount authorized by the permit -- but failed to state whether it considered RRBA to be a prevailing party on that issue.[2] (*See* App. B, *infra*, pp. 33a, 35a-36a.)

Despite having set aside and remanded two significant issues, the district court nevertheless determined that the petitioner was not entitled to an award of fees and expenses for the time spent in litigating those issues because the Corps' position taken as a whole was "not unreasonable in fact or law" and therefore was substantially justified. (App. B, *infra*, p. 36a.)

The court below affirmed, holding that "the district court did not err in refusing to atomize the case but properly

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[2] Although the district court's order is unclear, under the law of the Fourth Circuit, RRBA is a prevailing party on that issue as well. *See, e.g., Abernathy v. Clarke*, 857 F.2d 237, 239 (4th Cir. 1988).

considered the Corps' 'position' in its entirety to determine whether it was substantially justified . . . ." (App. A, *infra*, p. 28a.) In so ruling, the court below endorsed a reading of the statute that flies in the face of the purpose for which it was enacted and that conflicts directly with the decisions of two other courts of appeals.

The phrase "position of the United States" is not defined in the statute or in the legislative history and neither provides any insight into what Congress meant by that phrase in a case involving multiple issues. *See Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir. 1983). This Court has not explicitly addressed the precise question of statutory interpretation presented by the decision of the court below. In light of the conflict among the courts of appeals, it is appropriate that the Court address that issue.

As noted above, a central purpose of EAJA is to remove the financial disincentive to challenging unreasonable conduct by the Government, thereby helping to "assure that

administrative decisions reflect informed deliberation." *Jean*, 496 U.S. at 165 n.14 (quoting S. Rep. No. 96-253, p. 6 (1979)). If the interpretation of the phrase "position of the United States" by the court below is left standing, it will resurrect the financial barrier to challenging governmental misconduct and uninformed decisionmaking that the statute was designed to eliminate.

This case presents a good illustration of unreasonable and uninformed agency decisionmaking. The district court remanded two issues -- the striped bass issue and the "water need" issue -- to the Corps because the Corps had not engaged in reasoned decisionmaking. Specifically, the Corps had not considered certain facts that it was required to consider and had not conducted the type of independent analysis that it was required to conduct. In short, as to the striped bass and need issues, the Corps had not done what the law required.

The EAJA is designed to discourage governmental agencies from ignoring their duties. If an agency fails to engage in the type of "informed deliberation" required by law, it must pay the costs of being forced to do so by a private litigant.

If the test under EAJA is, as suggested by the court below, that an administrative agency is substantially justified with respect to an agency decision that the court remanded either because the agency's *overall* position was ultimately upheld by the court or because the court concludes that the Government's "totally insupportable and clearly unreasonable position" on one of several issues is an "inconsequential aspect of the litigation" (*see* App. A, *infra*, p. 22a), citizens will be deterred from challenging arbitrary and egregious decisions where the citizen is not certain of victory on the agency's overall position. As the Third Circuit has observed, that result thwarts EAJA's central purpose of shifting the financial burden of successfully challenging an

agency's unreasonable position from the private litigant to the Government, and cannot have been intended by Congress. *See Goldhaber*, 698 F.2d at 197.

In *Pierce v. Underwood*, 487 U.S. 522 (1988), this Court construed "substantially justified" as used in EAJA to mean "justified to a degree that could satisfy a reasonable person." *Id.* at 565. The position of the United States on the striped bass issue at the agency level and in the initial round of litigation (1984-1987) could not satisfy a reasonable person. The obstinate refusal of the Corps to consider an obviously relevant factor such as the existing adequacy of water flow for striped bass even without a 60 mgd diversion from the river system was, as the district court itself concluded, not "reasoned." 665 F. Supp. at 442-43. Similarly, the utter disregard by the Corps of its plain duty under unambiguous regulations[3] to conduct its own

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[3]40 C.F.R. § 1506.5; 33 C.F.R. Part 230, App. B, ¶¶ 3 & 8(b).

independent evaluation of the project's probable effect on striped bass was not only without substantial justification, but without justification of *any* kind.

In *Goldhaber*, the Third Circuit addressed the same issue addressed by the court below and reached the opposite conclusion. After determining that "neither the Act by its terms nor its legislative history appears to contemplate multiple positions of the government," the Third Circuit concluded: "Looking, therefore, to the underlying purpose of the Equal Access to Justice Act, we believe that this purpose requires that the words 'the position of the United States' must be understood to refer to the government's defense against each of the plaintiff's claims presented before the trial court." *Id.* (emphasis added). The *Goldhaber* court then followed the *Hensley* approach, holding that the United States should be charged with only "that portion of the expenses attributable to its unjustifiable positions." *Id.*

Shortly after *Goldhaber* was decided, the Eleventh Circuit "adopt[ed] the approach of the Third Circuit." *Matthews v. United States*, 713 F.2d 677, 683 (11th Cir. 1983). *Goldhaber* and *Matthews* remained the only authority on this issue at the circuit court level until the decision of the court below issued on April 20, 1993, creating a split in the circuits.[4] That conflict should be resolved by this Court.

Although only the applicability of EAJA's "substantial justification" condition is at issue here, the Court's interpretation of the "prevailing party" standard in *Hensley* is instructive. As this Court has held, "plaintiffs may be considered 'prevailing parties' for attorney's fees

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[4] Significantly, the court below did not even mention *Goldhaber* or *Matthews* in its opinion. Instead, it blindly accepted the district court's statement that it could not find any authority on the issue as a finding that there was no authority on the issue. *See* App. A, *infra*, p. 12a-13a. One obvious explanation for the district court's failure to discover any authority for the proposition that substantial justification of the position of the United States is determined on an issue-by-issue basis is that the district court ruled on the fee request without allowing RRBA an opportunity to respond to the Government's "inclusive whole" argument.

purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F. 2d 275, 278-79 (1st Cir. 1978)). Thus, the test for determining whether a party has prevailed calls for an issue-by-issue analysis.

It would be inconsistent with this Court's holding in *Hensley* for the determination of the first EAJA condition to be made on an issue-by-issue basis while a determination of the second condition depends on an evaluation of the overall position of the Government. This Court has already decided that a "partially prevailing party" may recover fees and expenses to the extent that the party prevails.[5] *See Hensley*, 461 U.S. at 440. It would be contrary to the teachings of

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[5] Moreover, numerous federal courts have applied the *Hensley* analysis to fee applications brought under EAJA to grant fees and expenses to a partially prevailing party -- without detailed discussion of the substantial justification issue. *See, e.g., Cinciarelli v. Reagan*, 729 F.2d 801, 804-05 (D.C. Cir. 1984).

Hensley to deny fees to a partially prevailing party because the Government prevailed on other issues.

This Court in *Jean* drew a parallel between the approach to be followed in analyzing whether a party is a "prevailing party" and whether the position of the United States lacks substantial justification. *See Jean*, 496 U.S. at 160. That case dealt with *phases* of litigation (*e.g.*, discovery requests, fee applications or appeals), not *issues* in litigation. The Government's reliance here on the "inclusive whole" dictum in *Jean* assumes incorrectly that the same analysis should be followed as to *issues* in litigation as was employed with respect to *phases* of litigation. Applying that approach in *Jean* advanced the objectives of EAJA. On the other hand, applying an "inclusive whole" analysis to instances where a plaintiff succeeds on some but not all of the claims asserted, as the court below did, frustrates the purpose of EAJA by allowing the Government's unreasonable and uninformed position on one or more issues to avoid the

effect of EAJA's fee-shifting provision simply because all of the Government's *other* positions were reasonable.[6]

Moreover, shifting the "substantial justification" focus away from the very issues on which the Government lost to the overall position in the litigation, where all issues are somehow "blended," fosters sloppy agency decisionmaking. If an agency believes that its overall decision ultimately will be upheld and that it faces no penalty for failing to address each issue reasonably and in accordance with the law, it will be less concerned about whether it takes the steps that it is required to take in reaching that decision. The EAJA was enacted specifically to avoid that result.

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[6]As did the defendants in *Perales v. Casillas*, 950 F.2d 1066 (5th Cir. 1992), the court below "read *Jean* too broadly." *Id.* at 1073. EAJA's legislative history and this Court's decision in *Jean* both indicate that a court must look at the Government's pre-litigation and litigation positions in evaluating the "substantial justification" defense to an award of fees and expenses. Neither, however, addresses the case where a claimant prevails on some, but not all issues in the litigation.

CONCLUSION

The decision of the court below conflicts in every respect with the decisions of the Third and Eleventh Circuits on the very same question. The question presented is one of importance to the sound application of EAJA. Accordingly, review by this Court to resolve that conflict is warranted.

Respectfully submitted,

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Dated: July 19, 1993

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1526

ROANOKE RIVER BASIN ASSOCIATION,
Plaintiff-Appellant,

and

STATE OF NORTH CAROLINA; BRUNSWICK COUNTY, VIRGINIA, BOARD OF SUPERVISORS; CHARLOTTE COUNTY, VIRGINIA, BOARD OF SUPERVISORS; GRANVILLE COUNTY, NORTH CAROLINA; HALIFAX COUNTY, VIRGINIA, BOARD OF SUPERVISORS; HALIFAX COUNTY, NORTH CAROLINA; MARTIN COUNTY, NORTH CAROLINA; MECKLENBURG COUNTY, VIRGINIA, BOARD OF SUPERVISORS; NORTHAMPTON COUNTY, NORTH CAROLINA; VANCE COUNTY, NORTH CAROLINA; WARREN COUNTY, NORTH CAROLINA; WASHINGTON COUNTY, NORTH CAROLINA,

Plaintiffs,

v.

RONALD E. HUDSON, Colonel, in his official capacity as Norfolk District Engineer; WAYNE A. HANSON, in his official capacity as Wilmington District Engineer; JOSEPH K.

BRATTON, LT. GEN., in his official capacity as the Chief of Engineers of the U.S. Army Corps of Engineers,

Defendants-Appellees,

and

WILLIAM R. GIANELLI, in his official capacity as Assistant Secretary of the U.S. Department of the Army; JOHN O. MARSH, in his official capacity as Secretary of the U.S. Department of the Army; CITY OF VIRGINIA BEACH,

Defendants.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, District Judge.
(CA-84-36-BR)

Argued: February 3, 1993

Decided: April 20, 1993

Before HALL, MURNAGHAN, and NIEMEYER, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Hall and Judge Murnaghan joined.

COUNSEL

ARGUED: Patrick Michael McSweeney, McSWEENEY, BURTCH & CRUMP, P.C., Richmond, Virginia, for Appellant. J. Carol Williams, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C. for Appellees. ON BRIEF: Michael V. Hernandez, McSWEENEY, BURTCH & CRUMP, P.C., Richmond, Virginia, for Appellant. Vicki A. O'Meara, Acting Assistant Attorney General, Robert L. Klarquist, Glen R. Goodsell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Margaret Person Currin, United States Attorney, Raleigh, North Carolina, for Appellees.

OPINION

NIEMEYER, Circuit Judge:

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, provides that parties who prevail in litigation with the United States are entitled to reimbursement of reasonable attorney's fees unless the position of the United States "was substantially justified." 28 U.S.C. § 2412(d)(1)(A). In protracted litigation with the Army Corps of Engineers, the Roanoke River Basin Association challenged the Corps'

issuance of a permit to the City of Virginia Beach for the construction of a pipeline to transport 60 million gallons of water per day from Lake Gaston in the Roanoke River basin to Virginia Beach to satisfy its potable water requirements.[1] Although the Association was unsuccessful in blocking the issuance of the permit, the district court found that on at least one issue the Association was a "prevailing party." The

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[1]The City of Virginia Beach initiated litigation on January 9, 1984, to obtain review and approval of its permit in the Eastern District of Virginia. That case was subsequently transferred to the Eastern District of North Carolina, following our decision in *City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484 (4th Cir. 1985), in which we found the Virginia court lacked personal jurisdiction over the governor of North Carolina, a named defendant. Once the interests of the parties were protected by intervention in this case, the transferred case was dismissed.

This case, raising the same issues, was commenced by the State of North Carolina a few days after the case filed in Virginia. Following a remand of the matter to the Corps for further investigation, *North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987), the district court ultimately upheld the pipeline project's legality, *North Carolina v. Hudson*, 731 F. Supp. 1261 E.D.N.C. 1990). We affirmed in *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1164 (1992).

A collateral issue of what construction could commence pending issuance of a permit from the Federal Energy Regulatory Commission was decided in *North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991).

court nevertheless denied the Association an award of attorney's fees because it found the position of the Corps in processing the permit was substantially justified.

On appeal, the Roanoke River Basin Association does not contest the district court's finding that the overall position of the Corps was substantially justified. Rather, it contends that *on the issue on which it prevailed*, the Corps' position was not substantially justified. The Association maintains that the district court erred as a matter of law by focusing its attention on the litigation as a whole for resolving the question of whether the Corps' position was substantially justified when the court found that the Association was a prevailing party on only one issue. We disagree and affirm the judgment of the district court.

I

The State of North Carolina and other parties interested in protecting the water resources of the Roanoke River basin instituted this litigation against the Army Corps of Engineers in January 1984. They challenged the Corps' issuance of a permit to Virginia Beach for the construction of a pipeline from Lake Gaston, which straddles the Virginia-North Carolina border, to Virginia Beach, a distance of some 85 miles, to supply Virginia Beach with potable water, which had been in short supply. The Roanoke River Basin Association intervened in the litigation in May 1984 and in its complaint sought to declare the Corps' permit and water supply storage agreement with the City of Virginia Beach "null and void and of no effect." In its nine-count complaint, the Association alleged a long list of deficiencies attributed to various failings that it imputed to the Corps' consideration of inadequate information, biased processing of

the permit, and result-oriented decision-making. More specifically, the Association alleged that the Corps failed to consider relevant and available studies and information from other agencies; failed to assess Virginia Beach's specific needs for the pipeline; failed to consider the practicality of reasonable alternatives; failed to consider the impact of the diversion of water on the needs of the communities in the Roanoke River basin, including residential, recreational, commercial, and industrial uses; failed to consider the impact of the project on water quality in the Roanoke River and on the environment, including the impact of the project on the striped bass that spawn in the Roanoke River; and erroneously concluded that an Environmental Impact Statement was not necessary. Indeed, it may be fairly stated that in its 35-page complaint the Association challenged the Corps' permit on virtually every basis on which its issuance rested.

On motions for summary judgment filed by all parties, the district court, after considering the administrative record developed in Norfolk consisting of 13 volumes and 254 exhibits, an administrative record developed in Wilmington consisting of several volumes, and additional documents submitted by the parties during the summary judgment process, rejected the challenges of the Association in every respect except two, finding that:

> Although the Corps failed to consider some relevant factors which require a remand for the reconsideration of its determination, on the whole the Corps' decision reflects a careful analysis of the environmental and non-environmental factors implicated by the permit and water storage reallocation contracts.

North Carolina v. Hudson, 665 F. Supp. 428, 449-50 (E.D.N.C. 1987). On the two aspects excepted, the court

concluded that the Corps' analysis was not adequately supported, and it remanded those issues to the Corps, retaining jurisdiction over the case. Id. 450. In particular, the court concluded that in connection with the project's impact on the striped bass, the Corps relied on Virginia Beach's worst case projections, rather than conducting its own independent analysis, leaving open the possibility that the permit could be based on false premises or misinformation. The court also concluded that the Corps had not made a specific determination of the extent to which Virginia Beach's water needs supported the 60 million-gallon-per-day amount authorized by the permit.

After conducting more hearings and receiving more evidence on remand, the Corps issue a Supplemental Environmental Assessment, a Supplemental Statement of Findings, and a Revised Finding of No Significant Impact. These documents reaffirmed the necessity of the permit

amount of 60 million gallons per day, the conclusion that any potential effect on the striped bass would be minimal, and the determination that an Environmental Impact Statement was unnecessary. Notwithstanding its conclusion that the pipeline project would have no significant impact on the striped bass, the Corps amended the permit's conditions to include a mitigation measure that Virginia Beach be required, as a condition of the permit, to allow use of some of its stored water during the bass' spawning period in the unlikely event that it might be needed to maintain the flow of the river. The Corps concluded that this mitigation measure "will virtually eliminate the possibility of any adverse effects of even minimal significance which this project could cause during the critical life stages of the Roanoke/Albemarle striped bass." *North Carolina v. Hudson*, 731 F. Supp. 1261, 1266 (E.D.N.C. 1990).

The district court reviewed the record as expanded during the remand proceedings and upheld the issuance of the permit. 731 F. Supp. at 1273. On appeal we affirmed, concluding that "[t]he Army Corps of Engineers properly considered all factors that it was required to consider before issuing a permit. Its decision to issue a permit for the project shall not be disturbed." *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 66 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1164 (1992).

In connection with the two issues remanded by the district court to the Corps, the Roanoke River Basin Association filed a petition under the EAJA for attorney's fees in the amount of $174,248 and expenses of $6,109. The district court found that the Association "did succeed on a significant issue -- the striped bass issue -- and that that success achieved at least some of the benefit RRBA [Roanoke River Basin Association] sought: further review of the

problem and a mitigation measure to help protect the striped bass. Hence, RRBA is a prevailing party." Rather than focusing on the striped bass issue in determining whether the United States' position was substantially justified, however, the court looked more broadly to the entire proceedings, concluding as follows:

> The court's 1987 decision held merely that the Corps failed to take a hard enough look at the striped bass problem and the extent of the water need. In light of the magnitude of the project, the Corps' significant tasks under relevant environmental statutes and regulations, and the Corps' overall "careful analysis of the environmental and non-environmental facts," 665 F. Supp. at 449-50, the court concludes that the Corps' initial SOF [Statement of Facts], EA [Environmental Assessment], and FONSI [Finding of No Significant (Environmental) Impact], were not unreasonable in fact or law. Rather, the Corps' position was substantially justified within the meaning of EAJA.

The court indicated in its decision that it was unable to find any authority that required it to focus on the question

of whether the government's position on "specific, isolated issues was substantially justified," and it indicated that the Supreme Court's decision in *Commissioner, INS v. Jean*, 496 U.S. 154 (1990), suggests otherwise. This appeal followed.

II

Section 2412(d)(1)(A) of Title 28 provides in pertinent part:

> [A] court shall award to a prevailing party other than the United States fees and other expenses...incurred by that party in any civil action...brought by or against the United States in any court having jurisdiction of that action, *unless the court finds that the position of the United States was substantially justified*....

(Emphasis added).[2] In concluding that the Roanoke River

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[2]Other provisions of the EAJA, not relevant here and therefore not quoted, establish additional requirements that must be met before a fee award can be made. The Supreme Court has summarized the requirements:

> [E]ligibility for a fee award in any civil action

Basin Association is a "prevailing party," the district court found that the Association succeeded on a significant issue which achieved some of the benefits sought by the litigation, i.e., the Corps' reviewing the striped bass issue and adopting a mitigating measure to help protect the bass. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (defining "prevailing party"). The court, however, rejected the Association's contention that it should focus only on the striped bass issue in determining whether the Corps' position was substantially justified, concluding that the Corps' position *in the litigation* was substantially justified. Thus, notwithstanding its finding

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> requires: (1) that the claimant be a "prevailing party"; (2) that the Government's position was not "substantially justified"; (3) that no "special circumstances make an award unjust"; and, (4) pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement.

Commissioner, INS v. Jean, 496 U.S. 154, 158 (1990).

that the Corps had been arbitrary and capricious in failing to make an independent determination of the project's effect on the striped bass and in relying on the Virginia Beach worst case scenario, the district court concluded, "In light of the magnitude of the project, the Corps' significant tasks under relevant environmental statutes and regulations, and the Corps' 'overall careful analysis of the environmental and non-environmental facts,'"[3] the Corps' position was "not unreasonable in fact or law."[4]

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[3]The internal quotation is from the district court's initial disposition of the merits of the underlying case, *North Carolina v. Hudson*, 665 F. Supp. 428, 449-50 (E.D.N.C. 1987).

[4]In *Pierce v. Underwood, 487 U.S. 552 (1988), the Court elaborated on the meaning of "substantially justified" in the context of the EAJA, concluding that the phrase does not mean "justified to a high degree," but rather represents a position of substance -- "that is, justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue." Id. at 565. The Court added, "To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness." Id. at 566. See also United States v. Paisley, 957 F.2d 1161, 1165 (4th Cir. 1992).*

The Roanoke River Basin Association contends that the district court's approach constitutes a "flat error of law." It maintains that "[i]t is incongruous to require only partial success for determining whether a party prevails, but then to deny fees and expenses because the government prevailed on a majority of the issues in the case."

The Corps contends the district court ruled properly on this issue, relying principally on *Commissioner, INS v. Jean*.[5] In *Jean*, it was found that the fee petitioners, a class of Haitians challenging their detention in prison by the INS while awaiting classification, were prevailing parties and that

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[5]The Corps also contends that the Roanoke River Basin Authority was not a "prevailing party" because it failed to achieve virtually every aspect of the relief sought. Even though the Corps was required to take another look at its conclusions that the striped bass would not be adversely affected and that an Environmental Impact Statement is not required, it was never required to change its position on these points. Because we affirm the district court on the grounds that the government's position is substantially justified, we do not reach the question of whether the court erred in concluding that the Association is a prevailing party.

the INS' position on its own regulations was unreasonable and not substantially justified. In the proceeding to determine the appropriate amount of attorney's fees, however, the INS argued that, because its position *in the fee determination phase* of the case was justified, it should not be required to reimburse petitioners for their fees in prosecuting that portion of the litigation. The Supreme Court held that once the criteria of the EAJA are met *in a single case in its entirety*, the extent to which fees are awarded for a particular phase is left to the discretion of the trial court without the necessity of finding whether each separate phase of the litigation meets the requirements of the EAJA. "The single finding [that the EAJA criteria are met] thus operates as a one-time threshold for fee eligibility" in the entire case. 496 U.S. at 160.

While it is apparent, therefore, that *Jean* instructs that a single finding of governmental misconduct compelling a

party to resort to litigation or to prolong litigation can open the door to recovery under the EAJA, it is not entirely clear whether Congress intended that any misconduct or unreasonable stance by the government during the course of numerous phases of litigation can give rise to an award. Relying on the words of the EAJA, the Court in Jean concluded that "[w]hile the parties' postures on individual matters may be more or less justified, the EAJA -- like other fee-shifting statutes -- favors treating a case as an inclusive whole." *Id.* at 161-62. The Court noted that the language of the statute refers to an award in a *civil action*, in the singular, "without any reference to separate parts of the litigation." *Id.* at 159. The holding in *Jean*, however, did not squarely resolve how to determine whether the government's position in the action was substantially justified when it loses on only one issue.

We have previously noted generally that determining whether the government's position is substantially justified for the resolution of an EAJA claim "has proved to be an issue of considerable conceptual and practical difficulty." *United States v. Paisley*, 957 F.2d 1161, 1165 (4th Cir. 1992). We now confront another aspect of this difficulty: the question of whether we focus only on the issue on which the fee petitioning party prevailed or on the entire litigation when determining whether the government's position was substantially justified.

The EAJA was enacted to address Congress' concerns with civil actions in which the government is litigating against private parties whose resources are substantially outweighed by those of the government. Absent a potential right for reimbursement of litigation expenses, a private litigant might be coerced to agree to orders that represent an unreasonable exercise of government power and reflect an

erroneous or inaccurate application of an agency rule of general application. It was anticipated that, by providing a mechanism for leveling the playing field, not only would access by private litigants to the courts and administrative proceedings be facilitated, but also the public interest would be served by insuring, through a more balanced adversarial process, that only reasonable governmental positions on policy and rules would be enforced. *See Jean*, 496 U.S. at 163 n.11, 165 n.14. Moreover, it is clear that Congress intended to address governmental misconduct whether that conduct preceded litigation, compelling a private party to take legal action, or occurred in the context of an ongoing case through prosecution or defense of unreasonable positions. *See Thompson v. Sullivan*, 980 F.2d 280, 281-82 (4th Cir. 1992) (citing *Jean*, 496 U.S. at 158-60); *Crawford v. Sullivan*, 935 F.2d 655, 656-57 (4th Cir. 1991) (same).

Although *Jean* did not resolve whether to look to the

case as a whole in determining whether the government's position was substantially justified, we must begin with the observation that it surely discourages an issue-by-issue analysis of the government's posture throughout each phase of the litigation:

> Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA -- like other fee-shifting statutes -- favors treating a case as an inclusive whole, rather than as atomized line-items.

496 U.S. at 161-62. While we do not construe the Court's statement to mean that we may look only at the government's macrocosmic position before or during litigation to determine whether it is substantially justified, we do rely on *Jean* as directing a more broadly focused analysis that would reject the view that *any* unreasonable position taken by the government in the course of litigation automatically opens the door to an EAJA fee award. Accordingly, we conclude that

when determining whether the government's position in a case is substantially justified, we look beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation. In doing so, it is appropriate to consider the reasonable overall objectives of the government and the extent to which the alleged governmental misconduct departed from them.

Thus a more egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's "position" in the entire case as unreasonable, whereas a totally insupportable and clearly unreasonable position by the government on an inconsequential aspect of the litigation might not. Similarly, a broader government position that, considered in a vacuum, would not be clearly egregious might still, in the overall context of the case,

constitute an unreasonable position because of its impact. Although an unreasonable stance taken on a single issue may thus undermine the substantial justification of the government's position, that question can be answered only by looking to the stance's effect on the entire civil action. We therefore conclude that, while a party may become a "prevailing party" on a single substantive issue from which benefit is derived, satisfying one prong of the EAJA, it does not automatically follow that the government's position in the case as a whole is not substantially justified.

The Association maintains that it is "incongruous" to conclude, on the one hand, that it was a "prevailing party" on one issue and, on the other hand, not to focus *on that issue* when determining whether the government's position was substantially justified. This argument has some logic, but it tends to advance a *per se* rule that whenever a petitioner clearly prevails on any issue, a fee award follows.

We do not think these two prongs of the EAJA -- whether the petitioner is a prevailing party and whether the government's position is substantially justified -- were intended to be so closely linked. It is well established that to be a "prevailing party" a party need only obtain some sought-after relief on a substantial issue in the litigation, *see Hensley*, 461 U.S. at 433 (1983), and that the legal relationship of the parties must be materially altered by the relief granted or the settlement reached, *see Farrar v. Hobby*, 113 S. Ct. 566, 572-73 (1992). The focus when determining whether a petitioner is a prevailing party is aimed at the degree of success obtained by the petitioner. Whether the government's "position in the litigation" is substantially justified, in contrast, focuses, not on the government's success or failure, but on the reasonableness of its position in bringing about or continuing the litigation. While the EAJA redresses governmental abuse, it was never

intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong. In short, the policy considerations underlying these two prongs of the EAJA differ, justifying the different scopes of focus.

Turning to the case at hand, we recognize that the overall position of the Army Corps of Engineers was its decision to grant a permit for construction of a pipeline from Lake Gaston to Virginia Beach. Secondary to that, it remains undisputed that the Corps traversed all the applicable regulations, finding, after three days of public hearings and a detailed review process, that an environmental impact statement was not required and that Virginia Beach's needs justified the permit. Included within the scope of the Corps' inquiry were the project's impact on the environment and the

probable water needs of Virginia Beach. Only in that context was it found that two efforts of the Corps were deficient -- the reliance on Virginia Beach's worst case scenario in lieu of an independent assessment of the project's impact on the striped bass and the failure to justify specifically 60 million gallons per day based on actual projected needs of the Virginia Beach area.

The Roanoke River Basin Association undertook to obtain a judgment declaring the permit null and void and thereby to retain the water of Lake Gaston within the Roanoke River basin, primarily because the diversion of water from the basin to the James River basin would adversely affect those in the Roanoke River basin area. As the district court expressly found in this regard,

> [T]he center of the controversy here is the *inter-basin transfer* of water. The controversy is not state against state, but basin against basin, the James River Basin against the Roanoke River Basin....It is quite natural for

> citizens to be concerned with the withdrawal of water from the basin in the area in which they live for use in another place....Nevertheless, whether to permit inter-basin transfer of water is essentially a political decision.

731 F. Supp. at 1272-73. The Association's objective was to overturn such a political decision and have the permit declared null and void on any of a long list of legal grounds. While it lost on all points in the end, in the process it did gain the benefit of an ameliorating measure that the Corps agreed to incorporate in order to eliminate any doubt about the project's effect on the striped bass. The district court found that on this point the Association was a prevailing party.

Without deciding the correctness of the district court's conclusion that the Roanoke River Basin Authority was a prevailing party, we conclude that the court did not err in considering the Corps' position *in the entire case* and the

court's finding that that position was not rendered unreasonable by the two deficiencies found is not clearly erroneous. While the district court found that the Corps should have conducted an independent assessment of the project's impact on the striped bass, rather than relying on the applicant's worst case scenario, the independent assessment was thereafter conducted and its results vindicated the Corps' position.

Having concluded that the district court did not err in refusing to atomize the case but properly considered the Corps' "position" in its entirety to determine whether it was substantially justified or was undermined by misconduct in connection with specific issues, we are left only with the task of reviewing the court's exercise of discretion on the mixed question of law and fact whether to award attorney's fees

under the EAJA. *See Pierce v. Underwood*, 487 U.S. 552, 562-63 (1988). Finding no abuse of discretion by the district court, we affirm.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 84-36-CIV-5-BR

STATE OF NORTH CAROLINA, et al.,

Plaintiffs,

v. ORDER

COLONEL RONALD E. HUDSON, et al.,

Defendants.

This matter is before the court on the Roanoke River Basin Association's ("RRBA") petition for attorneys fees and expenses in accordance with the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). On 13 December 1990, the court stayed its consideration of the petition pending termination of the appellate process. That process came to a close on 24 February 1992 when the Supreme Court denied

plaintiffs' petition for certiorari. Thus, the fee petition is now ripe for resolution.

The facts of this case have been thoroughly reviewed in this court's 1987 and 1990 orders. *See North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987); *North Carolina v. Hudson*, 731 F. Supp. 1261 (E.D.N.C. 1990), *aff'd*, 940 F.2d 58 (4th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3578 (U.S. Feb. 25, 1992). They will not be reviewed again here.

Under EAJA,

> a court shall award to a *prevailing party* other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust.

Id. § 2412(d)(1)(A) (emphasis added). The federal defendants argue that RRBA was not a "prevailing party" and that the position taken by the Army Corps of Engineers ("Corps") in its initial statement of findings ("SOF"), environmental assessment ("EA"), and finding of no significant impact ("FONSI") was "substantially justified."

A plaintiff is a prevailing party within the meaning of EAJA if it succeeds on any significant issue in the litigation and that success achieves at least some of the benefit plaintiff sought. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In its 1987 order, the court held 1) "that the FONSI as it relates to striped bass was arbitrary and capricious," 665 F. Supp. at 443 and 2) that "the Corps erred in not making a determination, as part of its public interest review, of the *extent* of the applicant's need." *Id.* at 447 (emphasis in original). The court remanded the case to the Corps for 1) "an independent assessment of the effects of the proposed

project on striped bass to determine whether the preparation of an EIS is required or whether any mitigative measures are necessary" and 2) to "make a determination of the extent of Virginia Beach's water needs." Id. at 450. The Corps made these two assessments and returned to the court with them in 1990. Importantly, the Corps added a mitigation measure to lessen the pipeline's impact on striped bass.

Based on the foregoing, the court finds that RRBA did succeed on a significant issue--the striped bass issue--and that that success achieved at least some of the benefit RRBA sought: further review of the problem and a mitigation measure to help protect the striped bass. Hence, RRBA is a prevailing party.

To be "substantially justified" within the meaning of EAJA, the government's position must be reasonable in fact and law. *Abernathy v. Clarke*, 857 F.2d 237, 239 (4th Cir. 1988). Just because the court finds an agency's action

arbitrary and capricious does not necessarily mean that its position was not substantially justified. *Id.*

The federal defendants point to the following passage from the court's 1987 order in support of their position that the initial documents produced by the Corps were substantially justified:

> Although the Corps failed to consider some relevant factors which require a remand for the reconsideration of its determination, *on the whole the Corps' decision reflects a careful analysis* of the environmental and nonenvironmental facts implicated by the permit and water storage reallocation contracts.

Hudson, 665 F. Supp. at 449-50 (emphasis added). In response, RRBA argues that the Corps' position on at least two issues--the striped bass issue and the extent of water need issue--was not substantially justified. It points to the

following passages from the 1987 order: "The Corps conducted no independent analysis of the pipeline's effects on striped bass but relied on Virginia Beach's worst-case conclusions." *Id.* at 442. "[A] searching analysis of the actual need for water including an assessment of the supply currently available is a necessary component of any attempt to assess the extent of the public need for the project." *Id.* at 443.

RRBA points to no authority, and the court has found none, which would segment issues in this fashion and ask whether the government's position on specific, isolated issues was substantially justified. Indeed, the Supreme Court has strongly suggested that the court's approach should be to evaluate the litigation as a whole: EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items." *Commissioner of INS v. Jean*, 110 S. Ct. 2316, 2320 (1990).

The court's 1987 decision held merely that the Corps failed to take a hard enough look at the striped bass problem and the extent of the water need. In light of the magnitude of the project, the Corps' significant tasks under relevant environmental statutes and regulations, and the Corps' overall "careful analysis of the environmental and nonenvironmental facts," 665 F. Supp. at 449-50, the court concludes that the Corps' initial SOF, EA, and FONSI were not unreasonable in fact or law. Rather, the Corps' position was substantially justified within the meaning of EAJA.

For the foregoing reasons, RRBA's petition for attorneys fees and expenses is hereby DENIED.

This 6 March 1992.

/s/ W. Earl Britt
United States District Judge

No. 93-93

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROANOKE RIVER BASIN ASSOCIATION, PETITIONER

v.

RONALD E. HUDSON, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In determining whether the position of the United States was substantially justified for purposes of an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412, whether the court should consider the overall position of the United State in the action, rather than its position on each individual issue as to which it did not prevail.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-29a, is reported at 991 F.2d 132. The district court's opinion (Pet. App. 30a-36a) is unreported. The prior opinions on the issues underlying this attorney's fees case are found at 940 F. 2d 58; 731 F. Supp. 1261; and 665 F. Supp. 428.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1993. The petition for a writ of certiorari was filed on July 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), provides, in relevant part, that:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party * * * fees and other expenses * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The Act was amended in 1985 to provide that the phrase the "position of the United States" means "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based" (28 U.S.C. 2412(d)(2)(D)).

This case arises from the denial of petitioner's application for EAJA attorney's fees in connection with its intervention in a challenge by the State of North Carolina to the U.S. Army Corps of Engineers' decision to issue a permit to, and to execute a contract with, the City of Virginia Beach, Virginia. The permit allows the construction of a water intake facility and pipeline to bring water from Lake Gaston on the Virginia-North Carolina border to Virginia Beach. The contract allows Virginia Beach to store water in Kerr Reservoir, upstream of Lake Gaston. The denial of fees was based on the finding that the position of the United States was substantially justified.

2. a. On January 12, 1984, the State of North Carolina filed suit in the Eastern District of North Carolina against various officials of the Corps of Engineers and the Department of the Army. District Court Clerk's Record (CR) 1. The State claimed, in relevant part, that the Corps had violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, since it had not prepared an Environmental Impact Statement

(EIS), and that it had violated its public interest review regulations by arbitrarily and capriciously determining that Virginia Beach had a legitimate need for the water.[1] 665 F. Supp. at 431. On June 20, 1984, petitioner, eight counties in North Carolina, and four counties in Virginia were allowed to intervene as plaintiffs. CR 22. Petitioner's complaint in intervention claimed, in relevant part, that the Corps had violated NEPA by failing to prepare an EIS (C.A. App. 31-37), and by arbitrarily determining that Virginia Beach needed an autonomous water source (*id.* at 42-44).[2]

b. In July 1987, the district court upheld the Corps' decision against all but two of the many challenges. *North Carolina* v. *Hudson*, 665 F. Supp. 428. The district court found that the Corps should not have relied on Virginia Beach's analysis of the effect of the project on striped bass[3] without conducting an independent analysis (*id.* at 442-443). The court also found that the Corps had failed to address sufficiently the extent of the public need for the project. *Id.* at 446-447. Accordingly, the district court remanded the matter to the Corps: (1) to "make an independent assessment of the effects of the proposed project on striped bass to determine whether * * * an EIS is required or whether any mitigative measures are

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[1] The State's fifteen-count complaint also alleged violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.*; the Federal Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*; and the Water Supply Act of 1958, 43 U.S.C. 390b-390f.

[2] Petitioner's complaint also alleged violations of the Clean Water Act and the Water Supply Act.

[3] Every spring, striped bass migrate up the Roanoke River to Weldon, N.C., which is downstream of Lake Gaston, to spawn. The Corps, in cooperation with other entities, augments the flow of the river during the spawning period in order to maintain a fixed minimum water level on the river gauge at Weldon. See 731 F. Supp. at 1264.

necessary; and (2) [a]s a part of its public interest review [, to] make a determination of the extent of Virginia Beach's water needs." *Id.* at 450.

c. On remand, the Corps conducted a 17-month investigation of those issues. The final Supplemental Environmental Assessment (SEA) prepared by the Corps concluded that the water withdrawal allowed by the permit would have no impact, let alone a significant impact, on the spawning of striped bass. 731 F. Supp. at 1264.[4] Out of an abundance of caution, the Corps nevertheless required, as a condition of the City's permit, that it use the water stored in the Kerr Reservoir to eliminate "the loss of any augmented spawning flow days which would otherwise be caused by the City's withdrawal." *Id.* at 1265-1266. As to the extent of the need for water, the Corps evaluated the available data and additional submissions, and concluded that the City needed at least the 60 million gallons per day that the permit would authorize. *Id.* at 1266.

d. The district court upheld the Corps' decision on remand based on the supplemental record. *North Carolina* v. *Hudson*, 731 F. Supp. 1261 (1990). The court of appeals affirmed. *Roanoke River Basin Ass'n* v. *Hudson*, 940 F.2d 58 (1991). This Court denied a petition for a writ of certiorari on February 24, 1992. 112 S. Ct. 1164.

3. a. Petitioner filed a petition for an award of attorney's fees and expenses under EAJA, seeking more than

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[4] The 1983 Environmental Assessment had found, on the basis of Virginia Beach's submission, that the project would cause the loss of the last spawning day once every four years. 731 F. Supp. at 1264. By contrast, the SEA found that the project would cause a loss of the last day of augmented spawning flows in one out of every seven years. *Ibid.* The SEA found that evidence indicated that the depletion of striped bass was primarily the result of overfishing, and that spawning was not affected by fluctuations in the rate of flow in the river. *Id.* at 1265.

$188,000 in attorney's fees and more than $6,000 in expenses, based on its work on the two issues that were remanded to the agency.[5] The government argued in response that petitioner was not a prevailing party (C.A. App. 212-214, 217-218),[6] and that, in any event, the government's position was substantially justified (*id.* at 214-217, 219). It also argued that special circumstances made an award of fees unjust.[7]

b. Following the February 24, 1992, denial of petitioner's petition for certiorari seeking review of the merits, the district court denied the petition for EAJA fees and expenses. The court rejected the government's assertion that petitioner had not prevailed on the NEPA issue, noting that following remand, "the Corps added a

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[5] The petition was filed on March 5, 1990, and supplemented on August 8, 1990, to include work preparing the petition. C.A. App. 165, 378. By order dated December 13, 1990, the district court stayed consideration of the petition, finding it premature, since no final judgment (as that term is used in EAJA) had been reached. C.A. App. 391.

[6] The government asserted that petitioner did not prevail on the NEPA issue, since its primary contention had been that the Corps was arbitrary and unreasonable in deciding not to prepare an EIS prior to issuing the permit, a decision the district court ultimately upheld. C.A. App. 212-214. The government also contended that petitioner did not prevail on the issue related to Virginia Beach's need for water. Petitioner had challenged the City's need for an "autonomous" water source, but that need was never questioned by the district court. The court only remanded the question of the *extent* of the need. C.A. App. 217-218.

[7] The government pointed out that petitioner had raised some 27 issues, many of which were frivolous and misleading. Petitioner's pleading nevertheless required substantial effort on the part of the Corps in response. C.A. App. 228; Appellee's C.A. Br. 11-12 n.8. The statement at Pet. 9 that the government acknowledged on appeal that it had not contended that any special circumstances existed that would make an EAJA award unjust is accordingly incorrect.

mitigation measure to lessen the pipeline's impact on striped bass." Pet. App. 33a. However, the court found the government's position to be substantially justified, "[i]n light of the magnitude of the project, the Corps' significant tasks under relevant environmental statutes and regulations, and the Corps' overall 'careful analysis of the environmental and nonenvironmental facts'" (*id.* at 36a).

c. The court of appeals affirmed. Relying on this Court's decision in *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990), the court rejected petitioner's claim that the district court should have considered the government's position on each issue as to which it lost in isolation from the government's position as a whole. Rather, it concluded (Pet. App. 22a):

> when determining whether the government's position in a case is substantially justified, we look beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation. In doing so, it is appropriate to consider the reasonable overall objectives of the government and the extent to which the alleged governmental misconduct departed from them.

ARGUMENT

The decision of the court of appeals is correct and fully consistent with the decisions of this Court, including *Commissioner, INS* v. *Jean*, 496 U.S 154 (1990). The decision does not conflict with the holding of any court of appeals decision rendered after the enactment of the congressional amendment defining the term "[the] position of the United States." Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 12, 18, 20-21) that the court of appeals' decision is inconsistent with *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). *Hensley*, however, did not involve the Equal Access to Justice Act, and hence the *Hensley* Court did not consider the issue in this case—whether, in determining under EAJA whether the position of the United States was substantially justified, a court should evaluate the entire position of the United States, rather than only individual issues as to which the government lost. The question presented in *Hensley* was the entirely different one of "whether a partially prevailing plaintiff may recover an attorney's fee [under 42 U.S.C. 1988] for legal services on unsuccessful claims." 461 U.S. at 426. As to that issue, the Court held that the level of a plaintiff's success on individual issues is relevant in determining the amount of fees to be awarded under Section 1988. *Id.* at 435-436.[8]

Petitioner suggests that the court of appeals' decision is inconsistent with *Hensley* because *Hensley* decided that "a 'partially prevailing party' may recover fees and expenses to the extent that the party prevails * * * [and that] [i]t would be contrary to the teachings of *Hensley* to deny fees to a partially prevailing party because the Government prevailed on other issues." Pet. 20-21. But *Hensley*—which arose under the attorney's fee provision of the Civil Rights Act, 42 U.S.C. 1988—did not hold, as petitioner suggests, that a partially prevailing party may collect fees under EAJA to the extent that that party prevails. EAJA, unlike Section 1988, provides that fees are to be awarded only when the position of the United States was not substantially justified. *Hensley*

[8] The district court recognized that *Hensley* is relevant to the issue of whether petitioner was a prevailing party in this case (Pet. App. 32a), an issue that the court of appeals found it unnecessary to consider (*id.* at 16a n.5, 27a).

did not address this EAJA requirement, much less write it out of EAJA.

In any event, the court of appeals did not hold in this case that a partially successful party may not collect fees simply because the United States was substantially justified on other issues. Rather, it held that, in assessing whether the position of the United States was substantially justified, a court looks beyond the issues on which the fee applicant prevailed and determines from the totality of the circumstances whether the government acted reasonably. The court explained (Pet. App. 22a):

> Thus a more egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's "position" in the entire case as unreasonable, whereas a totally insupportable and clearly unreasonable position by the government on an inconsequential aspect of the litigation might not.

The court of appeals' case-by-case approach to assessing whether the position of the United States is substantially justified is entirely consistent with *Hensley*.

2. Petitioner suggests (Pet. 10, 12, 15-16, 21-22 n.6) that the court of appeals' decision is inconsistent with *Commissioner, INS* v. *Jean*, *supra*. To the contrary, however, the decision is a faithful application of this Court's rationale in *Jean* to the circumstances of this case.

At issue in *Jean* was "the application of the 'substantially justified' condition." 496 U.S. at 158. The question in *Jean* arose in the context of an application for attorney's fees for work on the attorney's fee application. This Court resolved the question of whether another determination as to substantial justification need be made as to the government's position on the attorney's fees application by looking to the language and the

legislative history of EAJA's definition of "position of the United States." This Court held that the use of the singular word "position" to identify both the litigating posture and the underlying agency action, and the use of the singular in requiring that an application show "that the position of the United States was not substantially justified" indicate "that only one threshold determination for the entire civil action is to be made" of that position. 496 U.S. at 159-160. The Court also noted that the legislative history of EAJA suggests a single determination of substantial justification: "Congress' emphasis on the underlying Government action supports a single evaluation of past conduct." *Id.* at 159 n.7, citing H.R. Rep. No. 992, 98th Cong., 2d Sess. 9, 13 (1984); S. Rep. No. 586, 98th Cong., 2d Sess. 10 (1984); and H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980). Accordingly, the Court held that "[t]he single finding that the Government's position lacks substantial justification, like the determination that a claimant is a prevailing party," operates as a one-time threshold for fee eligibility. 496 U.S. at 160. "The 'substantial justification' requirement of the EAJA establishes a clear threshold for determining a prevailing party's eligibility for fees, one that properly focuses on the governmental misconduct giving rise to the litigation." *Id.* at 165. The court of appeals' holding in the instant case that a court should look to the government's position in its totality, not in isolation to each issue as to which the government did not prevail, is fully faithful to this Court's analysis of the language and legislative history of EAJA's definition of the "position of the United States." A contrary holding would have been inconsistent with the rationale of *Jean*.

3. Petitioner concedes (Pet. 11 n.1) that "no other court has articulated the issue presented here precisely as did the court below" but, nevertheless, claims (Pet. 11, 18-19) that the court of appeals' decision is inconsistent

with *Goldhaber* v. *Foley*, 698 F.2d 193, 197 (3d Cir. 1983), and *Matthews* v. *United States*, 713 F.2d 677, 683 (11th Cir. 1983).[9] *Goldhaber* and *Matthews* do appear to hold that the substantial justification evaluation must be performed on an issue-by-issue basis.[10] However, both cases were decided prior to the 1985 amendments to EAJA that added the definition of the "position of the United States" to the statute. No court of appeals since then has followed the approach of those early decisions.

Indeed, in post-amendment cases, the Third Circuit has clearly recognized that the question of substantial justification is a question as to the "agency's position viewed as a whole." *Brinker* v. *Guiffrida*, 798 F.2d 661, 664 (1986); *Taylor* v. *Heckler*, 835 F.2d 1037, 1040 (1987). In *Myers* v. *Sullivan*, 916 F.2d 659, 666 n.5 (1990), and *Hudson* v. *Secretary of Health & Human Services*, 839 F.2d 1453, 1456 n.2 (1988), the Eleventh Circuit also acknowledged that the "position of the United States" encompasses an evaluation of both the agency's prelitigation conduct and the subsequent litigation position of the Justice Department. That court has also stated in dicta, however, that "[u]nless the government can establish that *all* of its positions were substantially justified, the

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[9] Petitioner notes (Pet. 19 n.4) that the court of appeals did not mention these cases in its opinion, and attributes this failure to a blind following of the district court's decision. But petitioner referred to these two cases only once in the court of appeals: in its opening brief as the eleventh and twelfth cases in a string citation to thirteen cases.

[10] Petitioner claims (Pet. 11 n.1) that a number of courts have followed the analysis set forth in *Goldhaber* and *Matthews*. None of the other cases cited by petitioner supports its claim that a court is required to analyze the government's position on each issue as to which it did not prevail and make a separate, isolated determination as to whether the position on each issue was substantially justified.

claimant is entitled to receive attorney's fees." 916 F.2d at 666 n.5 (emphasis in original); accord 839 F.2d at 1456 n.3. That statement does not unambiguously indicate whether *each* position is to be considered in isolation or *all* positions are to be evaluated as a whole.[11] In light of this Court's analysis in *Jean*, it is far from clear how the Eleventh Circuit would interpret those dicta, or whether it would adhere to them, if it were to consider the issue presented to the court below. Thus, there is no current conflict in holdings among the circuits as to this issue, and no present need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] *Hudson* relies for this statement on *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489 (11th Cir. 1986), and *Myers* relies on *Hudson*. In *Haitian Refugee Center*, the court found that "assuming the government was correct as to the due process and equal protection issues, it was patently unreasonable to carry on this litigation when the plaintiffs were entitled to relief under an alternative basis." 791 F.2d at 1499-1450. The court thus looked at the government's position as a whole; it found that the government's substantial justification as to some issues did not, in that case, make its position as a whole substantially justified. The analysis in *Haitian Refugee Center* is entirely consistent with that of the court below.